

Evaluating Situations of Alleged Sexual Harassment

The following evaluation criteria have been used by courts and the EEOC in evaluating alleged incidents of sexual harassment:

SEX DISCRIMINATION OR SEXUAL HARASSMENT?

For a general rule-of-thumb, consider this:

- *It is sex discrimination when a member of one sex is treated differently from members of the opposite sex.*
- *However, if the conduct is sexual in nature, it takes the form of sexual harassment.*

Note: Sexual harassment can also involve the misuse of power. Persons may sexually harass others in an attempt to influence their working or personal relationship or to control employment decisions.

REASONABLE WOMAN STANDARD

In 1991, the *Elison vs. Brady* case in the 9th Circuit Court of Appeals identified an additional standard for determining when unwelcome sexual behavior can create a hostile work environment: Would a reasonable person of the victim's sex (in this case a woman) find that behavior hostile, offensive, or intimidating and adversely affect his or her ability to work? Previously, the standard was a reasonable person; i.e., would a reasonable person find the unwelcome sexual behavior to be hostile, intimidating, or offensive; and would it adversely affect his or her ability to do his or her job?

The "reasonable woman" standard acknowledges that what a reasonable man and a reasonable woman would find intimidating are often different. A "reasonable man," in other words, may not object to behavior or situations that a "reasonable woman" would object to. Though the same situations may exist for men and women, they often react to them differently.

Evaluating Situations of Alleged Sexual Harassment

OTHER CONSIDERATIONS

As the EEOC Guidelines emphasize, the *totality of circumstances involved* are examined in determining incidents of alleged sexual harassment. It is also common for the *frequency* and *severity* of the behavior or situation to be considered when determining cases of alleged sexual harassment. The *credibility of the parties involved* may also be considered.

SEX-BASED HARASSMENT

A related concept to sexual harassment is sex-based harassment. Sex-based harassment is behavior that denigrates, ridicules, or abuses an employee because of his or her sex. For example, a male might repeatedly refer to a female co-worker using abusive language that criticizes "women" in general. Such acts of physical aggression, intimidation, hostility or unequal treatment based on sex may be combined with incidents of sexual harassment to establish the existence of discriminatory terms and conditions of employment.

THIRD-PARTY SEXUAL HARASSMENT

Sexual harassment may be alleged by employees who feel that a behavior or situation which does not directly involve them creates a hostile work environment or affects employment decisions which are of concern to them. For example, an employee could allege that overhearing the sexually intimate phone conversations of another employee creates a hostile work environment. Or, an employee could allege sexual harassment if the sexual relations between their supervisor and another employee affects the employment decisions made about his or her own career.